

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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JUL 13 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Number Portability Query Services)	CC Docket No. 98-14
)	
Pacific Bell Tariff F.C.C. No. 128)	CCB/CPD 98-23
Transmittal No. 1927 and 1973)	
)	
Southwestern Bell Tariff F.C.C. No. 73)	CCB/CPD 98-17
Transmittal No. 2638 and 2694)	
)	
Ameritech Tariff F.C.C. No. 2)	CCB/CPD 98-26
Transmittal Nos. 1123, 1130)	
)	
Bell Atlantic Tariff F.C.C. No. 1)	CCB/CPD 98-25
Transmittal No. 1041)	

MOTION FOR LEAVE TO FILE OUT OF TIME

Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTelecom"), by its attorneys, hereby files a motion pursuant to 47 CFR § 1.3 for leave to file out of time its "Opposition to Direct Cases" ("Opposition"). The Opposition is being filed contemporaneously herewith.

The FCC established a deadline of July 10, 1998 for filing oppositions in the above-referenced proceeding.¹ TWTelecom seeks this waiver for good cause. Due to the short opposition period, TWTelecom's technical experts were unable to finish reviewing Southwestern Bell Telephone Company's direct case and transmittals regarding default query charges. Rather than file

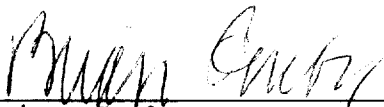
¹ Number Portability Query Services, CC Dkt. No. 98-14, Order Designating Issues for Investigation (rel. June 17, 1998).

OTC

an incomplete opposition, TWTelecom elected to file a complete opposition along with this motion.

For the foregoing reasons, TWTelecom requests the Commission to grant its motion.

Respectfully submitted,



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COMMUNICATIONS HOLDINGS
INC. d/b/a TIME WARNER TELECOM

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OPPOSITION TO DIRECT CASES

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OPPOSITION TO DIRECT CASES

Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTelecom"), by its attorneys, hereby files its opposition to the direct cases filed in support of the above-captioned tariff transmittals.

INTRODUCTION AND SUMMARY

The carriers subject to this investigation have made no attempt in their Direct Cases to comply with the cost recovery principles established by the FCC for local number portability ("LNP"). In each case, the carriers openly state that their tariffs do not meet the FCC requirements and (in the case of SBC, Pacific Bell, and Ameritech) proceed to argue that the FCC's rules are inappropriate. The incumbent LECs of course have no intention of bringing their tariffed rates into compliance until

it is absolutely necessary to do so. The incumbents view any delay in the implementation of appropriately priced LNP services as an opportunity to raise their rivals' costs.

The attempt made by SBC, Pacific Bell and Bell Atlantic in their Direct Cases to justify charging for default queries on calls to an NXX with no ported numbers is part of a similar strategy. As TWTelecom has demonstrated elsewhere, such charges are completely unnecessary. They are merely another attempt by the incumbents to transform LNP cost recovery into an entry barrier.

The FCC must not sanction the incumbents' dismissive and cynical approach to this proceeding. The rates for LNP query services must be set in accordance with the incremental cost guidelines established by the FCC in the LNP Third Report and Order. Moreover, the Commission must clearly state that incumbents may not charge N-1 carriers for default queries on calls to NXXs without any ported numbers.

DISCUSSION

The Direct Cases filed in response to the FCC's June 17, 1998 Order Designating Issues for Investigation,¹ as each of the filing incumbent LECs admits, fail to comport with the cost recovery guidelines established by the Commission in the Third

¹ See Number Portability Query Services, Order Designating Issues for Investigation, CC Docket No. 98-14, CCB/CPD 98-26, CCB/CPD 98-25, CCB/CPD 98-23, CCB/CPD 98-17 (rel. June 17, 1998) ("Designation Order").

Report and Order in the number portability proceeding.² The carriers filing the instant Direct Cases must therefore amend their LNP tariffs to bring them within compliance of the FCC's rules established in the Third Report and Order. The arguments raised by the incumbents in support of their general position that the FCC's LNP cost recovery rules should be changed belong in reconsideration petitions or court appeals. For the purposes of this proceeding, the carriers must comply with the rules as they exist, and they have not done so. Finally, for reasons explained in previous TWTelecom filings, the Commission should reject the incumbents' attempt to charge for default queries on calls to an NXX before any number in the NXX has been ported.

I. THE DIRECT CASES FAIL TO COMPLY WITH THE COMMISSION LNP COST RECOVERY RULES.

Section 251(e)(2) states that the "cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." The incumbent LECs may recover through query charges and end user charges only those costs that the FCC deems to constitute the "costs of establishing . . . number portability." In the Third Report and Order, the Commission held that this statutory provision covers only costs directly related to providing number portability.³ Such direct costs include a

² See Telephone Number Portability, Third Report and Order, CC Docket No. 95-116, RM 8535 (rel. May 12, 1998) ("Third Report and Order").

³ See id. at ¶¶ 36-37.

carrier's share of the industry-wide costs of implementing LNP as well as carrier-specific costs that are directly related to implementing LNP.

LNP is of course designed to eliminate the entry barrier that has been caused by customers' inability in the past to change local carriers and keep their telephone numbers without experiencing service degradation. In an attempt to prevent the cost of LNP from itself becoming a barrier to competitive entry, the FCC has narrowly defined the carrier-specific costs that an incumbent LEC (or any other carrier) may characterize as directly related to LNP. Thus, the Commission held that it would not allow carriers to classify the entire cost of a network upgrade associated with LNP as "directly related" to LNP if that upgrade would also be used for the provision of other services. The FCC further explained its approach as follows:

[W]e will consider as subject to the competitive neutrality mandate of section 251(e)(2) all of a carrier's dedicated number portability costs, such as for number portability software and for SCPs and STPs reserved exclusively for number portability. We will also consider as carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability.

In addition, the Commission held that, under its approach to long term LNP cost recovery, "carriers may not use general overhead loading factors in calculating such costs."⁵ Rather, the FCC

⁴ See id. at ¶ 73.

⁵ See id. at ¶ 74.

explained that carriers may classify as LNP costs "only those incremental overheads that they can demonstrate they incurred specifically in the provision of long-term number portability."⁶

As the incumbents point out in their Direct Cases, the Third Report and Order was issued after the LNP tariffs at issue here were filed. As a result, the incumbent LECs should have sought to amend their tariffs as soon as possible to comply with these rules or, if they needed extra time, should have requested an appropriate extension.⁷ Instead, the incumbent LECs simply admit in their Direct Cases that their transmittals violate the FCC's rules and further argue that they should not be required to comply with the FCC's rules. Such disregard for applicable law cannot be tolerated.

For example, as the FCC noted in the Designation Order, SBC and Pacific Bell have used general overhead loading factors in determining the cost of query services.⁸ This is of course a violation of the requirement that carriers include in their cost

⁶ See id.

⁷ While it is true that there are issues related to the allocation of joint costs still pending in the FCC's LNP proceeding, the LNP tariffs could have easily been amended to bring them into compliance of the principles established in the Third Report and Order. Any minor adjustments could then be made if further rules regarding the allocation of joint costs are adopted in the future. Indeed, the incumbents' attempt to use pending issues regarding joint cost allocation as an excuse for delaying amending their LNP tariffs is simply another part of their strategy of turning LNP cost recovery into an entry barrier.

⁸ See Designation Order at ¶ 6.

studies only overhead that is incremental to LNP. In addition, SBC and Pacific Bell have apparently made no effort to demonstrate that the proportion of joint costs attributed to LNP under their tariffs meet the standard established in the Third Report and Order. Rather than seek to comply with the law, SBC and Pacific Bell simply argue that the FCC rules are unfair and unsound policy and should therefore be changed to allow general overhead loadings.⁹ These arguments belong in a petition for reconsideration of the Third Report and Order or court appeal of that order. They have no place in a Direct Case.

Ameritech also uses general overhead loading factors in violation of the FCC rules. Ameritech merely argues that its allocation of overhead costs to LNP complies with the FCC's price cap rules,¹⁰ which are of course inapplicable to LNP. In addition, Ameritech argues that the joint costs it allocates to LNP are direct costs because these costs would not have been

⁹ See Consolidated Response of SBC and Pacific Bell at 4-9. One of the arguments raised by SBC and Pacific Bell in support of their overpriced query charges is that carriers that think the rates are too high can simply purchase the service from another source. See id. at 3. This assertion is unconvincing for at least three reasons: (1) it is not clear whether alternative providers will offer reliable service or whether such alternative offerings will be ubiquitous; (2) even where another provider does offer a reliable alternative, one competitor is not enough to drive prices close to cost; and (3) if the incumbents were in fact concerned about competition in the provision of LNP query service, they would not be attempting at every turn to justify higher LNP query rates.

¹⁰ See Ameritech Direct Case at 4-6.

incurred "but for" LNP.¹¹ Again, Ameritech has proposed a straw man standard that is irrelevant to this proceeding. An upgrade to some part of the network, for example the SS7 network, might not have been made at this time "but for" the LNP requirement and yet the upgraded SS7 network might still be used for services other than LNP. As explained, the FCC has clearly stated that those other non-LNP services must bear a reasonable portion of the common costs of the upgrade. Ameritech simply disagrees with the FCC rules and allocates the entire cost of the upgrade to LNP.¹² Its tariff must therefore be amended to bring it into compliance with the FCC's rules.

Finally, Bell Atlantic states that its LNP rates are set to recover general overhead loading factors which Bell Atlantic claims was at least permissible at the time the Bell Atlantic tariff went into effect (which was of course before the release of the Third Report and Order).¹³ Bell Atlantic asserts that no refund should be applied to services purchased under the instant tariff. This argument assumes that the FCC lacked the authority to find Bell Atlantic's tariffed rates to be unreasonable before issuing the Third Report and Order. But Section 204 of the

¹¹ See id. at 6-8.

¹² See id. at 8 (stating only that the "fact SS7 is also used to provide other services does not alter the fact that the costs in question were for additions and modifications that would not have been incurred, but for LNP and the Query service")

¹³ See Bell Atlantic Direct Case at 2.

Communications Act grants the FCC full authority to rule on the reasonableness of any specific tariffed rates and to order refunds to customer who are overcharged.¹⁴ This authority is not conditioned on the presence of general FCC rules of the rate at issue in a tariff. Thus, Bell Atlantic must at the very least amend its tariffed rates to recover only incremental overhead costs, as required by the FCC's rules, and Bell Atlantic must refund all carriers purchasing query services under its tariff for any past overcharges.

In sum, the Direct Cases make no attempt to comply with the FCC's rules. The incumbent LECs must therefore be ordered to amend their tariffs promptly to comply with the applicable law.

II. THE COMMISSION SHOULD PROHIBIT CARRIERS FROM CHARGING N-1 CARRIERS FOR DEFAULT QUERIES PERFORMED ON CALLS TO ANY NXX FROM WHICH NO NUMBER HAS YET BEEN PORTED.

In their Direct Cases, Bell Atlantic and SBC restate their position that they should be able to charge N-1 carriers for default queries performed on calls to NXXs with no ported numbers. TWTelecom has demonstrated elsewhere why the incumbent LECs should not be permitted to levy charges for such premature queries, and will not repeat that discussion in detail here.¹⁵

¹⁴ See 47 U.S.C. § 204(a), (b) (allowing the FCC, with no requirement for a rulemaking proceeding, to subject any tariff that has gone into effect to an accounting order requiring the subject carrier to refund any carrier or end user who is deemed to have been overcharged as determined by the FCC's ultimate decision on the reasonableness of the tariff).

¹⁵ See Ex Parte Letter from Thomas Jones to Magalie Roman Salas, CC Docket No. 95-116, RM 8535; CCB/CPD 98-26; CCB/CPD 98-25; CCB/CPD 98-17; CCB/CPD 98-23 (June 16, 1998).

Suffice it to say, that such charges remove the flexibility the industry has agreed each carrier should have in completing its LNP upgrades. In other words, allowing incumbents to charge N-1 carriers prematurely essentially requires that the N-1 carrier perform its LNP upgrade when the incumbent does.¹⁶ Further, the fact that Ameritech has stated that it will not impose default query charges on calls to NXXs with no ported numbers is strong evidence that no such charges are necessary.

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See id.

CONCLUSION

For the reasons explained above, the Commission should require the carriers subject to this investigation to amend their LNP tariffs to comply with the FCC's rules adopted in the Third Report and Order. In addition, the FCC should prohibit incumbent carriers from charging for default queries performed on calls to NXXs with no ported numbers.

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July 13, 1998

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 13th day of July, 1998, copies of the foregoing "Opposition to Direct Cases" and "Motion for Leave to File Out of Time" of Time Warner Communications Holdings Inc. were hand delivered, unless otherwise indicated, to the following parties:

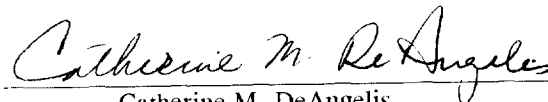
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